U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 January 2008

CASE NO.: 2007-AIR-7

In the Matter of:

MARK J. HOFFMAN,
Complainant

v.

NETJETS AVIATION, INC.,
Respondent

ORDER DENYING RESPONDENT'S MOTION IN LIMINE

The Background

Procedural Background

A hearing, involving the above-named parties, will be conducted under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 *et seq.* ("AIR Act") and the Toxic Substances Control Act, 15 U.S.C. § 2622 ("TSCA"), in the above-captioned matter, on January 14-18, 2008, in Columbus, Ohio. On January 3, 2008, the respondent, NetJets Aviation ("NJA" or "NetJets"), filed a *Motion In Limine* seeking to exclude numerous exhibits and testimony proffered by the complainant, in his Prehearing Submission. On January 9, 2008, the complainant submitted his Memorandum in Opposition to Respondent's *Motion In Limine.*

History

Complainant filed three OSHA complaints alleging AIR Act violations: on May 15, 2006; June 7, 2006; and, August 22, 2006. Complainant alleges that he has been discriminated against and has suffered from retaliation and a hostile work environment because he engaged in protected activities. Specifically, he complains of being placed on administrative leave, on or about April 21, 2006 through May 19, 2006, and receiving a letter of warning, on May 19, 2006, for violating NJA's recordation policy. In addition, Complainant asserts that he was denied a promotion to an OCARO position, in June of 2006, due to his protected activity.

Respondent's Contentions

The respondent argues that the testimony and evidence, which should either be excluded or limited, is irrelevant, as it concerns matters which have been previously litigated in Captain Hoffman's first AIR Act complaint against NetJets. In 2005, Complainant had brought suit

against the respondent under the AIR Act. In that case, Complainant alleged that he had suffered from retaliation and a hostile work environment because he had engaged in protected activities. A hearing was held in February of 2006, and the claims were subsequently denied. *See Hoffman v. Net Jets Aviation, Inc.*, 2005-AIR-00026 (August 4, 2006) *pet. for rev. filed*, ARB No. 06-141 ("*Hoffman I")*. Moreover, on September 24, 2007, I issued a Discovery Order limiting discovery to matters after January 1, 2006, and stated that Complainant is not permitted to retry matters related to his 2005 Complainant.[1] The respondent argues that Complainant is attempting to retry the earlier matter, in violation of my discovery order. Admission of the testimony and evidence sought to be excluded would create undue delay, waste of time, and needless presentation of cumulative evidence. Finally, the respondent argues that the proposed expert witness, Mr. Gabriel Bruno, is not qualified as an "expert," under the criteria established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) (*hereinafter* "*Daubert")*.

Complainant's Reply

The complainant states that the respondent "takes an overly narrow view of relevance in an effort to exclude evidence that Captain Hoffman needs to prove his case." He argues to prove animus by means of a "pattern of adversity," resulting from participation in *Hoffman I*, evidence from that case is relevant and must be introduced. Furthermore, he argues that employer's actions after the date of an adverse employment action may be introduced to establish the latter's motives or intent. Counsel avers he has prepared a collection of excerpts from the transcript of *Hoffman I* to not burden the record with unnecessary "clutter."

The Law

AIR Act and TSCA Statutory Elements

Both the AIR Act and TSCA require that the complainant establish that: (1) he or she engaged in protected activity; (2) he or she was subject to unfavorable employment action; and, (3) a causal connection exists between the protected activity and the adverse action. The burden then shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of the protected activity. *Peck v. Safe Air Int'l, Inc.*, ARB Case No. 02-028, ALJ Case No. 2001-AIR-3 (ARB January 30, 2004). Once the employer makes this showing, the complainant must show that the proffered reasons are pretextual. This can be done by showing that the proffered reason "(1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000).

To prevail on a hostile work environment claim, the complainant must establish that: (1) he or she engaged in a protected activity; (2) he or she suffered intentional harassment related to

[1] The Order stated, in pertinent part, "… no claims regarding an alleged hostile work environment or other complaints of retaliation for the period prior to **January 1, 2006**, which either were or could have been heard by Judge Roman, will be heard. Those matters were or should have been before Judge Roman and were denied or waived by not raising them. Furthermore, the Act requires complaints of violations to be filed within 90 days. 49 U.S.C. section 42121(b)(2). Thus, the merits of alleged violations, on or before the 90th day prior to Mr. Hoffman's first complaint, in the present case, May 15, 2006, will not be considered."

that activity; (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment; and (4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Jenkins v. Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2elec. Op. at 42 (ARB Feb. 28, 2003).

In AIR cases, the protected activity essentially is providing to the employer or federal government information regarding any alleged violation of any order, regulation, or governmental standard related to air carrier safety. 49 U.S.C. § 42121(a).

Motions in Limine[2]

The term "*in limine*" means "in or at the beginning," "on the threshold," or "at the outset." The motion *in limine* is a motion that is made before the trial has begun.
A motion *in limine* merely presents, in a pretrial setting, an issue of admissibility of evidence that is likely to arise at trial, and as such, the order, like any other interlocutory order, remains subject to reconsideration by the court throughout the trial. *Schuler v. Mid-Central Cardiology,* 313 Ill. App. 3d 326, 246 Ill. Dec. 163, 729 N.E.2d 536 (4th Dist. 2000).

The advantages of motion *in limine* practice are significant and persuasive. The pretrial consideration of prejudicial evidence problems speeds, simplifies, and purifies the process of obtaining just verdicts. As the trend favoring other pretrial proceedings, such as discovery, suggests, granting such motions may save time in the long run by minimizing the consideration of collateral issues and preventing extensive delays during the trial.

The practice of employing motions *in limine* is not without drawbacks. For example, it can be argued that the pretrial consideration of questions concerning evidence makes just and efficient adjudication of civil and criminal cases more difficult. Rulings *in limine* can never be totally accurate in balancing the probative and prejudicial values of a piece of evidence that is best evaluated in the total trial context. The trial becomes more "piecemeal" because of an increase in the number of separate issues being considered at different times. This may lead to an increase in the overall time required to try a given case, since evidentiary issues that may not even arise at trial may be given extensive pretrial consideration. In cases where the court's pretrial ruling proves to be improper and has prevented an attorney from developing evidence later ruled to be admissible, the "absolute" motion *in limine* creates automatic error and may increase the number of new trials ordered on appeal.

Counsel can often use a motion *in limine* to force his or her adversary to scale down the quantity of evidence he or she intends to offer in proving some element of the case. If the trial judge can be convinced that a large amount of proof would be of limited use in comparison with the amount of trial time it would require, or that undue emphasis may unduly exaggerate the importance of a particular issue, he may be disposed to grant the motion.

[2] This entire section was edited but extracted, nearly verbatim, from **20 AMJUR TRIALS 441,** Motion In Limine Practice.

Evidence that would be inadmissible because of its lack of relevance to any issue in the case can be removed from the case through use of a motion *in limine,* prior to commencement of any proceedings before the jury wherever introduction or mere mention of the evidence might cause the jurors to develop a prejudiced attitude toward one of the parties. This not only protects the moving party but simplifies the issues to be tried as well. While we do not have concerns related to jurors, simplification of the issues and removal of evidence with little probative value is likewise important in administrative hearings.

Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial; denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded. *Knotts v. Black & Decker, Inc.*, 204 F. Supp. 2d 1029 (N.D. Ohio 2002).

Whether the motion *in limine* was granted or denied, the party against whom the trial court's ruling was made may be entitled to appeal if the ruling was erroneous and the error was properly preserved. However, no appeal may be taken by either party if the motion is denied but the evidence is never offered anyway.

Discussion of Facts and Law

While it is true that I had limited discovery to matters after January 1, 2006, and have stated that *Hoffman I* would not be retried, whistleblower law is fairly clear that courts should admit a "broad range of evidence" that may prove or disprove such allegations, particularly when allegations of a hostile work environment are being considered. *See, e.g., National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) and *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, n. 9, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006)(even a claim, i.e., adverse action, "not actionable, may be used as "background" evidence). In *Brune*, DOL's Administrative Review Board made clear that while discrete discriminatory acts are not actionable if time-barred, "all acts comprising a hostile work environment claim, even those occurring outside the limitations period, were actionable if one of the acts fell within the … filing period." (Emphasis added).

Although I may not and will not second-guess Judge Romano's earlier determination, I am obligated to admit a rather broad range of evidence of alleged protected activity and evidence concerning allegations of employer retaliation. While Judge Romano may have denied relief, particularly with respect to the alleged hostile work environment, it remains to be seen whether the complainant can establish that the balance has now changed.

Complainant's counsel has stated that he has culled-out the significant portions of evidence which was discussed in *Hoffman I*. I am very hopeful that will prove true and spare the unnecessary expenditure of time and resources. The alternative would be to admit the complete record of *Hoffman I*, which would not be as focused.

As the complainant points out, there is authority suggesting that an employer's actions after the date of an adverse employment decision may be probative, at least on the issue of whether the employee was treated differently than other similarly situated employees. *See*

Freeman v. Madison Metro. School District, 231 F.3d 374, 382 (7th Cir. 2000)(employer conduct ten (10) months after last challenged act).

The respondent's argument concerning Mr. Bruno's "expert" witness status is convincing. Thus, the complainant must make him available for *voir dire* to establish the *Daubert* criteria.

ORDER

Therefore, it is hereby ORDERED that:

1. Respondent's Motion is DENIED, in part, and GRANTED, in part;
2. Complainant must establish Mr. Bruno's "expert" witness status;
3. A telephone conference call will be conducted at **12:30 P.M**. (EST), **January 11, 2008**, to discuss matters raised in our OALJ email, dated January 10, 2008;
4. The employer's counsel is to finalize proposed stipulations provided to the parties by the judge and revised by the parties; and,
5. Complainant shall be present at the prehearing session scheduled for January 14, 2008.

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RICHARD A. MORGAN
Administrative Law Judge